Supreme Court, U.S.
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No. 01-0825

In The

Supreme Court of the United States

TEAMSTERS LOCAL UNION NO. 293,

Petitioner,

vs.

TRUSERV CORPORATION
f/k/a COTTER & COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF ON BEHALF OF THE RESPONDENT, TRUSERV CORPORATION, IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals understood and properly applied the standard for reviewing findings of the National Labor Relations Board when the Court of Appeals reviewed the entire administrative record concerning an impasse in contract negotiations and determined that the Board's findings lacked substantial evidence?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the Respondent, TruServ Corporation, states that it has no parent corporation and that no publicly held company owns 10% or more of the Corporation's stock.

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RELEVANT STATUTES

29 United States Code Section 160(e):

> . . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

29 United States Code Section 160(f):

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

STATEMENT OF THE CASE

A. Proceedings Below.

This case arises from negotiations in 1995 between the Petitioner, Teamsters Local No. 293 ("the Union"), and the Respondent, Cotter & Co. ("Cotter" or "the Company", which is now known as TruServ Corporation) for a new collective bargaining agreement. These 1995 negotiations ended in an impasse and Cotter subsequently implemented its Last, Best, and Final Offer. The Union contended that no impasse existed and that Cotter's implementation of its final offer was therefore unlawful. A hearing was conducted by an Administrative Law Judge ("ALJ") of the National Labor Relations Board ("Board"). The ALJ concluded that no impasse was reached and that the Company's implementation of its Last, Best, and Final Offer was accordingly unlawful. *Petit. App.* at A-26.[1] The Board adopted the rulings, findings, and conclusions of the ALJ, and added some of its own views that were not in conflict with the ALJ's decision. *Petit. App.* at A-2-7; *Cotter & Co.*, 331 N.L.R.B. No. 94 (July 19, 2000). Cotter petitioned the United States Circuit Court of Appeals for the District of Columbia to deny enforcement of the Board's ruling. The D.C. Circuit Court of Appeals examined the entire administrative record and concluded that the Board's decision was not based on substantial evidence. *Petit. App.* at A-44-61; *TruServ Corporation v. NLRB*, 254 F.3d 1105 (D.C. Cir. July 6, 2001).

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[1] References to the decisions of the Court of Appeals, the National Labor Relations Board, and the Administrative Law Judge are contained in the Petitioner's Appendix, and references herein to that Appendix are "Petit. App. at ___."

B. Statement of the Facts.

In July and August of 1995, Cotter and the Union met to negotiate a new collective bargaining agreement. (All dates herein are in 1995 unless specifically stated otherwise.) The central issue in this case before the Board and the D.C. Circuit was whether or not the parties reached an impasse in their bargaining. Unlike many cases involving bargaining impasse, this case does not involve any claim that Cotter engaged in bad faith bargaining during the parties' negotiating sessions. The Board's Complaint contained no such allegation of bad faith, and the ALJ and the Board never found any bad faith bargaining. *See* Consolidated Complaint, (J.A. 38-48);[2] *Petit. App.* at 4-7, 24-26, 55; *Cotter & Co.*, 331 N.L.R.B. No. 94, slip op. at 1-2, 7-9; *TruServ*, 254 F.3d 1105, 1115 n.10 (D.C. Cir. 2001).[3] Cotter and the Union's bargaining relationship dates back to at least the early 1980s (J.A. 194). Cotter's attempt to achieve a negotiated agreement in 1995 started when the Company requested that negotiations begin earlier than the parties usually started because Cotter recognized the importance of the issues faced by the parties. *Petit. App.* at A-46; (J.A. 323-324). The parties had eight days of

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[2] The Petitioner, Union, referred throughout its Petition to the joint appendix filed with the D.C. Circuit Court of Appeals. Accordingly, the Company is using the same references. "J.A. at ___" refers to that joint appendix.

[3] The only "bad faith" claim in this case specifically related to the Company's unilateral implementation of its final offer because the Board alleged the Company did so without a genuine impasse (*see* Consolidated Complaint, J.A. 40-44); no claim of bad faith prior to implementation was ever alleged or found below.

bargaining. Both parties agreed that the major issues in these negotiations were: (1) holidays; (2) the workweek and workday schedule; (3) health care; and (4) wages. *Petit. App.* at A-46; (J.A. 200, 203-204, 207, 276-277, 327-328). The D.C. Circuit's recitation of the substance of the parties' respective bargaining positions on these four key issues through the end of negotiations is accurate and the Supreme Court should use that fact statement. *See Petit. App.* at A-46-51. As found by the D.C. Circuit Court of Appeals, the parties remained far apart on these four major bargaining issues. *Petit. App.* at A-46-50. For example, on the major issue of wages, the Union's proposal was over twice the amount of the Company's Final Offer. *See Petit. App.* at A-49-50.

One of the factors that the Union claims shows no impasse is that Cotter held off putting its core wage proposal on the table during these first six sessions. The Union's claim, however, ignores two facts that explain why wages were not discussed until the last two days of bargaining: (1) historically, the parties deferred wage negotiations until the end of bargaining, *Petit. App.* at A-46; (J.A. 264-265); and (2) the Union asked the Company to wait until the end. On August 4, in the presence of the Union's chief negotiator, a Union bargaining committee member advised the Company regarding wages as follows: "If you give it to the bargaining committee too soon, they'll screw it up. They won't understand it, it'll get all garbled, and they won't understand it, they'll just screw it up, so you can't give them anything too early." Wendell Provost, the Company's chief negotiator, responded that he did not want to wait until the last minute, but he ultimately deferred to tradition and the

Union's request, presenting the Company's wage proposal on August 28, the penultimate day of bargaining. (J.A. 220, 268-69, 346-347).

Also on August 4, the Company told the Union the precise words that it would use when it reached the end of its bargaining rope: " . . . the Company wants to reach an agreement they [the Union] will recommend, if not we will reach a point and present a Last Best Final Offer for the membership to decide on." (J.A. 432); *see Petit. App.* at 56. On the last day of bargaining, August 29, the Company had reached the end of its bargaining rope and presented what it specifically called its "Last, Best, and Final Offer" (hereinafter referred to as "the Final Offer"). *Petit. App.* at 49. In response to the Company's Final Offer, the Union's lawyer, John Masters, who had been participating in the negotiations from the beginning, declared:

> [T]here was nothing [the Company] had given this union in negotiations, there wasn't anything that [the Union] could take back and recommend to the bargaining committee to get a collective bargaining agreement between the parties. [He] said straight out, there is nothing – there is – there is not anything here that we can recommend.

(J.A. 372). Masters then declared the Final Offer dead-on-arrival with the employees because the Union's bargaining committee would not recommend the offer, and he said that without the committee's recommendation, the Final Offer would not be ratified. *Id.*

The next day, August 30, the Union's members unanimously agreed not to vote on the Final Offer because "in

their eyes, it was so bad." (J.A. 249). The Union members also voted to strike Cotter & Co. (with the parties' collective bargaining agreement was set to expire the next day, August 31). (J.A. 249, 279).

On August 31, Attorney Masters told the Company's chief negotiator, Provost, that the Final Offer had not even been "dignified with a vote." (J.A. 379). From that point through the implementation of the Final Offer on September 6, the Union never indicated any willingness to compromise or to embrace the Final Offer in any respect.[4] After issuance of the Final Offer, there is absolutely no record evidence that any Union representative notified the Company of the areas in which the Union was willing to grant further concessions. *Petit. App.* at A-50. Instead, Masters merely asked for more meetings, without any suggestion of how further meetings might prove worthwhile in the face of the Company's good faith Final Offer. With each such request, the Company's representative reiterated that the Final Offer was indeed final. The Company's Final Offer was implemented on September 6.

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[4] The Union states in its Petition that it told the Company it was "willing to work on some type of a different work week." *See Petition* at 26-267. However, this statement from the Union occurred *prior* to the issuance of the Final Offer. (J.A. 234-235).

ARGUMENT

Reasons For Denying The Writ.

This case does not involve a conflict among the circuit courts or among different panels within the D.C. Circuit Court of Appeals. This case also does not involve a nationally important issue of labor law as evidenced by the fact that the National Labor Relations Board has not filed its own Petition or joined in the current Petition, and that no Board or court decision contains a citation to the decisions below in this case. Moreover, the D.C. Circuit Court of Appeals understood and properly applied the Supreme Court's decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The Court of Appeals reviewed the entire record, examined material facts completely ignored by the Board, noted that the Board abandoned other facts on review before the Court of Appeals, and noted the complete absence of substantive facts supporting other Board conclusions. Accordingly, no overarching issue of national labor law or policy exists in this case, and the D.C. Circuit did not misapprehend or grossly misapply *Universal Camera*. The Petition should therefore be denied in its entirety.

I. NO CONFLICT AMONG COURTS EXISTS ON THE ISSUES IN THIS CASE, AND NONE OF THE ISSUES ARE OF NATIONAL IMPORTANCE.

The Union seeks to invoke the Supreme Court's jurisdiction by contending that the panel of the D.C. Circuit Court of Appeals in this case (Edwards, former Chief Judge, Rogers and Garland, Judges) failed to understand and grossly misapplied the Supreme Court's decision in

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), concerning the Court of Appeals' role in evaluating administrative rulings. This much, therefore, is clear: The Union does not contend that any conflict exists among the United States Circuit Courts of Appeals relative to understanding and applying *Universal Camera*. The Union also does not contend that any conflict exists among different panels of the D.C. Circuit Court of Appeals, or that specifically Judges Edwards, Rogers, or Garland have demonstrated over time any inability to understand and to apply *Universal Camera*.

Not only is there no conflicting interpretation of law at issue in this case, but the D.C. Circuit's ruling does not implicate any issue of national importance. One indicator of this fact is that the National Labor Relations Board has not filed a Petition for a Writ of Certiorari and it has not joined the Union's Petition. Tellingly, as of the writing of this Response brief, no decision of the Board or any court has contained a cite to the Board's July 19, 2000 decision in the current case or to the D.C. Circuit's July 6, 2001 decision. The Union's Petition is also devoid of any assertions that the current case has any overarching national importance for labor law and labor policy, or more generally for appellate review of administrative decisions.

A significant reason why the Union's Petition does not involve conflicting court decisions is that cases concerning bargaining impasse are notoriously case-specific, involving complex and unique factual circumstances, rendering the disposition of such cases very much a question of fact. For example, the Fourth Circuit Court of Appeals recently issued a decision in *Grinnell Fire Protection Systems Company v. NLRB*, 236 F.3d 189 (4th Cir. 2000), *cert.*

denied, 122 S.Ct. 49 (2001), ruling that no impasse in bargaining existed based on the facts in that case. Grinnell filed a Petition for a Writ of Certiorari, and in response to the Petition, the Solicitor General, on behalf of the Board, explained that no conflict existed between *Grinnell* and the D.C. Circuit's decision in the current case because they are factually different:

> The District of Columbia Circuit's recent finding of an actual impasse in *TruServ Corp. v. NLRB*, 254 F.3d 1105 (2001), does not conflict with the court of appeals' decision in this case. In *TruServ*, unlike here, the parties had a long-standing preexisting bargaining relationship, and had met for negotiations twice as many times as had petitioner and the Union prior to petitioner's unilateral implementation of its final contract offer. *Id.* at 1116. Furthermore, the union in *TruServ* gave no indication that it was willing to make concessions in response to the employer's final offer. *Id.* at 1116-1117. In contrast, the Union here demonstrated its flexibility and willingness to make further concessions in response to petitioner's "final proposal" on April 12, 1994. Pet. App. 14a-15a.

Brief For The National Labor Relations Board In Opposition To Petition For Writ of Certiorari, Docket No. 00-1769, *Grinnell Fire Protection Systems Company v. NLRB*, at 18, n. 6 (*see* attached Appendix at A-3). Cases that are uniquely tailored to their facts, such as the current matter, rarely form the basis for principles with broad public policy implications. Accordingly, the Supreme Court has long counseled that narrow, fact-dependent cases are likely not appropriate for Supreme Court review. *See Layne & Bowler Corp v. Western Well Works*, 261 U.S. 387,

393 (1923) ("It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties.").

With no conflict among any courts on which to rely, no over-arching public policy implication, and a fairly unique set of facts limiting precedential value, the Union's Petition boils-down to a lengthy re-hashing of arguments that Cotter and the Board already thoroughly briefed to the D.C. Circuit concerning the factual record and the law as applied to that record. In the proceedings before the Court of Appeals, the Union filed no response brief (choosing instead to join in the Board's submission, *see* attached Appendix at A-4) and it did not appear for oral argument. Having essentially skipped the proceedings below (except for a petition for rehearing *en banc* in which the Board did not join and which was unanimously denied by the D.C. Circuit, *see* attached Appendix at A-5), the Union's Petition has the distinct appearance of a request that the Supreme Court perform an additional scouring of the record in a manner that Congress specifically vested in the Courts of Appeals. *See* 29 U.S.C. § 160(e) and (f). The Supreme Court should therefore not grant the Petition because the Court would be functioning as an additional Court of Appeals in this matter, rather than exercising the substantially more limited jurisdiction of this Honorable Court.

II. THE D.C. CIRCUIT COURT OF APPEALS UNDERSTOOD AND PROPERLY APPLIED *UNIVERSAL CAMERA* BY EXAMINING THE RECORD AS A WHOLE, BY NOTING KEY FACTS IGNORED BY THE BOARD, AND BY NOTING THE ABSENCE OF EVIDENCE FOR KEY CONCLUSIONS REACHED BY THE BOARD.

The Supreme Court in *Universal Camera* explained that "[w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals." *Universal Camera,* 340 U.S. at 491. The Supreme Court counseled that its power to review the Courts of Appeals "ought seldom to be called into action," and that the Court would intervene *only* in the "rare instance when the standard appears to have been misapprehended or grossly misapplied." *Id.* at 490-491. Prior to *Universal Camera,* some Courts of Appeals enforced Board rulings if the evidence supporting the ruling was, *by itself,* substantial, but the Court in *Universal Camera* prohibited this practice. *Id.* at 477-478. Instead, the Court mandated that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 488. As demonstrated below, the Union's Petition narrowly focuses only on those facts that the Union alleges supports the Board's ruling, and accordingly, the Union's Petition illustrates precisely the kind of contracted review of the record prohibited by *Universal Camera.*

The current case involves the law of bargaining impasse. The relevant factors for assessing impasse are "the bargaining history, the good faith of the parties in

negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *petition for review denied sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968). Within this legal framework, the D.C. Circuit's analysis demonstrates that the current case is not a "rare instance" of misapprehension or gross misapplication. The D.C. Circuit examined the record in this case, which the Company and the Board fully presented to the Court, and noted the following flaws in the Board's decision: (1) key record evidence was ignored by the Board, *see Petit. App.* at 55-56; *TruServ*, 254 F.3d at 1115-1116; (2) several key "factual findings" by the Board were abandoned by the Board on review before the D.C. Circuit Court of Appeals, *see Petit. App.* at 54; *id.* at 1115 n. 9; and (3) the Board's conclusion that no contemporaneous understanding existed ignored the fact the Company's Final Offer was truly final and that no evidence existed indicating any willingness by the Union to embrace the Final Offer. *See Petit. App.* at 57-59; *id.* at 1117.[5]

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[5] Two *Taft* impasse factors that were satisfied on the record, tending to demonstrate impasse, and about which there is no dispute, are: (1) that the parties had a long-standing bargaining history of successful agreements, which dated back at least to the early 1980s, *see* J.A. at 194; and (2) that both parties recognized there were four major bargaining issues, and that the major issues separating the parties were extremely important to both sides. (*See* J.A. 200, 203-204, 207, 276-277, 327-328); *see Petit. App.* at 25.

One key piece of evidence never considered by the Board, but expressly considered and found by the Court of Appeals, is the undisputed fact that the Company at all times demonstrated good faith in its bargaining, thus satisfying the good faith prong of the *Taft* analysis. *See Petit. App. at A-55-56.* Good faith is powerful evidence of impasse. *AMF Bowling Co., Inc. v. NLRB,* 63 F.3d 1293, 1299 (4th Cir. 1995). The Board also failed to recognize that the Company advised the Union on August 4 that when it reached its bottom-line, it would call its final offer its "Last Best and Final." (J.A. 432). The D.C. Circuit accordingly reached a factual conclusion that the Board failed to reach because it ignored key evidence: the Company's good faith "leaves no grounds for rejecting the Company's characterization of its August 29 proposal as its Final Offer." *Petit. App.* at A-56. Thus, the D.C. Circuit recognized that the entire assessment of the factual record and the law of impasse must proceed from the undisputed factual foundation that the Company truly and in good faith was at the end of its bargaining rope when it issued its Final Offer. *Id.* This foundation was ignored by the Board and is ignored by the Union in its Petition.

On the *Taft* factor concerning the length of the parties' negotiations, the Board in its administrative decision adopted four key findings made by the Administrative Law Judge ("ALJ") for asserting that an insufficient number of negotiations took place. *See Petit. App.* at A-25. On review before the D.C. Circuit, however, the Board (and the Union which joined in the Board's response brief) abandoned these findings by the ALJ that the Company (1) rejected "out of hand" "virtually all of the

Union's proposals" during the first six days of bargaining, (2) proposed language changes that were "radical departures" from the expiring agreement, (3) did not make an economic proposal until the penultimate bargaining session, and (4) did not give the Union information about its work week proposal until later in negotiations. *Petit. App.* at A-54, n. 9. Consequently, the Board and the Union, on review before the Court of Appeals, admitted that the Board's analysis on the *Taft* factor regarding the number of bargaining sessions lacked any substantial evidence.[6]

The D.C. Circuit also correctly applied *Universal Camera* in assessing the Board's conclusion that the parties

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[6] For these same reasons, the Union's contention in Section III.C.3. of its Petition – that substantial evidence existed for the Board's conclusion that too few bargaining sessions took place – lacks merit. The evidence relied on by the ALJ and Board for this finding was abandoned by the Board and the Union on appeal. Moreover, case law firmly establishes that the eight bargaining sessions in this case can form the basis of a bargaining impasse. *See, e.g., Western Publishing Co.*, 269 N.L.R.B. 355, 364 (1984) (impasse after 7 sessions); *Salinas Valley Ford Sales*, 279 N.L.R.B. 679, 690 (1986) (impasse after 7 sessions, and at least 3 prior labor agreements during 10-year relationship); *I. Bahcall Industries*, 287 N.L.R.B. 1257, 1258, 1262 (1988) (impasse after 6 sessions); *L.W. LeFort Co.*, 290 N.L.R.B. 344 (1988) (impasse after 7 sessions when union voted to reject final offer); *West Virginia Baking Co.*, 299 N.L.R.B. 306, 325 (1990) (impasse after 12 formal and informal sessions); *Concrete Pipe & Products Corp.*, 305 N.L.R.B. 152, 153 (1991), *enforced sub nom. United Steelworkers of America Local 14534 v. NLRB*, 983 F.2d 240 (D.C. Cir. 1993) (impasse after 4 sessions); *Prentice Hall, Inc.*, 306 N.L.R.B. 31, 41 (1992) (impasse after 8 sessions, and 3 prior successful labor agreements); *Georgia Pacific Corp.*, 305 N.L.R.B. 112, 121 (1991) (impasse after 9 bargaining sessions).

had no contemporaneous understanding concerning impasse. The Court of Appeals examined the record and noted the undisputed fact that the Company had bargained in good faith to its bottom line Final Offer. *See Petit. App.* at A-55-56. The Court of Appeals then examined the record as to the Union's conduct and found it wanting. "The Union's 'conduct' on which the Board relies – the Union's self-serving statement on August 29 that the parties were not at impasse and the Union's vacuous request on August 31 for additional meetings – is insufficient to demonstrate the Union's desire to pursue further negotiations." *Petit. App.* at A-57. The Court of Appeals' conclusion is correct because the only record evidence *after* the Final Offer is: (1) Masters' declaration that the Final Offer contained nothing that could be recommended to the membership (J.A. at 372); (2) Masters' declaration that the Final Offer was dead because the Union would not recommend it (J.A. at 372); (3) the Union membership's unanimous decision not to dignify the Final Offer with a vote (J.A. at 249, 279); (4) the Union's vote to strike (J.A. at 279); (5) Masters' requests for meetings that were devoid of any substance indicating any willingness to embrace the Final Offer or even to make a significant concession (J.A. at 378, 506-507); and (6) the Company's repeated statements to Masters that the Final Offer truly was final. (J.A. 592); *see Petit. App.* at A-50, 57. These facts establish impasse and indicate no willingness on the part of the Union to ever accept any aspect of the Company's good faith Final Offer. *See, e.g., Seattle-First*, 267 N.L.R.B. at 898 (impasse found in part because "the Union asserted that [the employer's] proposals were so onerous that the Union could clearly never

accept them."); *Larsdale, Inc.*, 310 N.L.R.B. 1317, 1320 (1993) (failure to move on positions between the time the final offer was declared and the time of implementation indicates deadlock); *Salinas Valley Ford Sales*, 279 N.L.R.B. at 690 (impasse after 7 sessions; union demonstrated hostility toward the final offer, voted to reject final offer and to strike).

The Union's attempt to downplay Masters' statements and conduct is based on case authority that is very different than the facts in the current case (*see* Petition at 21). In *NLRB v. Beverly Enterprises-Massachusetts*, 174 F.3d 13, 28 (1st Cir. 1999), the court held that an expression that an employer's proposal " 'would be very difficult to sell . . . ' is not the same as a rigid assertion that the union simply would not be moved [from its position]." *Id.* In contrast, the Union in the current case did not merely assert that the Final Offer would be difficult to ratify, but instead unequivocally said that the Union's committee would not recommend it because it contained nothing that could be recommended and would not dignify the Final Offer with a vote. The Union's reference to *NLRB v. WPIX, Inc.*, 906 F.2d 898, 902 (2nd Cir. 1990), is also inapposite. In *WPIX*, the Union's expressions of hostility toward the employer's proposals occurred in union members' newsletters that the employer never saw and that were never communicated to the employer during bargaining, *id.*; whereas in the current case, Masters and the Union communicated their unwavering opposition to the Final Offer directly to the Company.[7] Accordingly,

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[7] For these same reasons, the Union's contention in Section III.C.1. of its Petition – that substantial evidence supported the

impasse was demonstrated due to the Union's unequivocal rejection of the Final Offer and its vacuous requests to meet.

The Union in its Petition continues to ignore these aspects of the record relied on by the D.C. Circuit, and the Union instead focuses on facts that it contends supports the Board's decision. In doing so, the Union is engaging in precisely the type of narrow analysis that *Universal Camera* prohibits, namely a focus only on alleged facts that the Union contends supports the Board's decision. *See Universal Camera*, 340 U.S. at 491. In contrast, the D.C. Circuit examined the entire record including the Company's good faith bargaining, the Company's issuance of a good faith Final Offer that was truly final, the Board's abandonment of key factual underpinnings to its administrative decision, and the nature of the Union representatives' statements and conduct after the Final Offer was issued (*i.e.*, the unequivocal rejection of the Final Offer and vacuous requests for meetings). Therefore, the D.C. Circuit's decision demonstrates that the Court of Appeals did not misapprehend or grossly misapply *Universal Camera*.

The Union also contends that the D.C. Circuit misapplied *Universal Camera* in rejecting the Board's conclusion that the parties' movement during the two days leading up to the Final Offer negated an impasse. *See* Petition at 18. To the contrary, however, the D.C. Circuit analyzed the facts concerning alleged flexibility. First, the Court of

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Board's conclusion that no contemporaneous understanding as to impasse existed – lacks merit.

Appeals noted the fact (ignored by the Board and the Union) that the Company told the Union the precise words that would indicate it had reached its bottom line ("Last, Best, and Final Offer"), and second, the Court of Appeals noted that the Company had engaged in good faith bargaining throughout negotiations. *See Petit. App.* at A-56-57. Thus, not a shred of evidence in the record indicated that the Company's Final Offer was not truly final or that the Company had any flexibility. And, as already noted above, the statements and conduct from the Union after the Final Offer was issued contained no substance indicating any flexibility. These were all findings reached by the D.C. Circuit on examining the entire record of evidence, thus satisfying *Universal Camera*'s standard of review.

The Union ignores these facts, in contravention of *Universal Camera;* and instead, the Union contends in its Petition (as was also concluded by the Board) that the mere fact of significant movement by the parties *prior* to the Final Offer being issued necessarily negates impasse *after* the Final Offer is issued. As explained by the D.C. Circuit, the Board's conclusion in this regard was based on its "intuitive belief" about how the course of bargaining might have progressed if additional meetings were held, rather than on evidence in the record. Again, the only actual record evidence is that the Final Offer was truly final and that the Union categorically rejected it without providing any substantive response. *See Petit. App.* at A-56-58. The Board's approach is impermissible as a matter of long-established Supreme Court authority, as explained by the D.C. Circuit:

> This approach, however, is impermissible, for it amounts to an intervention by the Board in the parties' substantive negotiations. In *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404, 72 S.Ct. 824, 96 L.Ed. 1027 (1952), the Supreme Court observed that the Act's requirement of good faith bargaining "does not compel either party to agree to a proposal or require the making of a concession." Therefore, the Court held, "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *Id.; see also H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103, 90 S.Ct. 821, 25 L.Ed.2d 146 (1970). In short, the parties remain in control of their negotiations, and each party, not the Board, determines at what point it ceases to be willing to comprise. *See H.K. Porter Co.*, 397 U.S. at 103-04, 90 S.Ct. 821; *NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1163 (D.C. Cir. 1992). This is especially appropriate where, as here, the negotiations were conducted by experienced participants who were intimately familiar with the intricacies of the bargaining process and whose relationship spanned more than a decade.

Petit. App. at A-56-57.[8]

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[8] For these reasons, the Union's contention in Section III.C.2. of its Petition – that flexibility during the two days leading up to the Final Offer negated impasse – lacks any merit. Moreover, the Board itself has held that a parties' movement leading up to and even during the last bargaining session does not preclude impasse where the party's concessions fail to demonstrate a willingness to embrace the core of the other party's proposals. *See E.I. duPont & Co.*, 268 N.L.R.B. 1075, 1076 (1984) (impasse warranted irrespective of some movement in

The Union also contends that the D.C. Circuit erred in determining that the Board concluded the Company's Final Offer was *not* truly final, because the Union contends the Board never reached such a conclusion. *See* Petition at 15, 17. The point of the Union's contention is far from clear. A key factual issue in this case is whether or not the Final Offer was truly final. If the Board never determined whether or not the Final Offer was not truly final (as contended by the Union), its ruling is inherently flawed by ignoring a major fact determination necessary to the *Taft* impasse analysis, and the D.C. Circuit was therefore within its proper role under *Universal Camera* to determine that the Final Offer was truly final.

Lastly, the Union asserts that the D.C. Circuit's decision is somehow flawed because the Court of Appeals did not expressly state that no "reasonable jury" or "reasonable mind" could have reached the Board's conclusion. The Union appears to be contending that a special, talismanic phrase must be used in addition to the analysis of the entire record conducted by the Court of Appeals in this case. However, the "reasonable jury" or "reasonable mind" phrases are nothing more than another way to state "substantial evidence on the record as a whole." For

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parties' positions prior to implementation of final offer where the parties were not close to agreement on major issues); *United Steelworkers of America Local Union 14534 v. NLRB*, 983 F.2d 240, 242-43 (D.C. Cir. 1993) (union's movement after final offer issued did not preclude impasse on major wage issue); *Seattle-First National Bank*, 267 N.L.R.B. 897, 898 (1984) (impasse found even though company revised its final offer because still no movement on major issues).

example, in *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 366-367 (1998), the Supreme Court held:

> We must decide whether [the Board's] conclusion is supported by substantial evidence on the record as a whole. *Put differently*, we must decide whether on this record it would have been possible for a reasonable jury to reach the Board's conclusion.

Id. at 366-367 (internal citations omitted) (emphasis added). As the Court advised in *Universal Camera*, "[s]ince the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment." *Universal Camera*, 340 U.S. at 489. Regardless of the words used, a reviewing court fulfills its mandate under *Universal Camera* if it conscientiously reviews the entire record. *Id.* at 491. In the current case, the D.C. Circuit reviewed the entire record and noted that critical evidence was ignored by the Board, that the Board abandoned other supposedly important "findings", and that no evidence supported the Board's conclusion that further negotiations held-out hope for reaching an agreement. Accordingly, the D.C. Circuit demonstrated no lack of understanding relative to its role under *Universal Camera* and did not "grossly misapply" *Universal Camera*. For these reasons, the Petition should be denied.

The Union contends in its Petition that the D.C. Circuit improperly substituted its judgment for the Board's on the issues of whether a contemporaneous understanding as to impasse existed and as to whether movement in

the two days before the Final Offer precluded impasse. Petition at 20-22. As explained above, however, the evidentiary record when taken as a whole and in light of relevant case authority completely undermines the Board's rulings on these issues. Moreover, the D.C. Circuit was well-within its proper role under *Universal Camera* in rendering its judgment on these issues based on evidence and law. As directed by the Court in *Universal Camera*:

> The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

340 U.S. at 490. Accordingly, the D.C. Circuit complied with *Universal Camera*, thus requiring denial of the Petition relative to the Union's first Question Presented.

Moreover, in Section III.C. of its Petition, the Union contends that the Board's rulings on contemporaneous understanding, movement prior to the Final Offer, and the number of bargaining sessions were all based on substantial evidence. To the contrary, the above discussion in this Section II of the Company's Brief in Opposition demonstrates that the Union's position is incorrect. *See also* footnotes 6, 7 and 8 herein, *supra*. Accordingly, the Union's third Question Presented should also be denied. (Indeed, the narrow focus of the Union in its Section III on only a few of the *Taft* factors and on only select portions of the record again demonstrates that it is

the Union, not the D.C. Circuit, that is misapplying *Universal Camera*).

III. THE UNION'S DISAGREEMENT WITH THE D.C. CIRCUIT'S DETERMINATIONS ON THE LAW OF IMPASSE IMPLICATES NO CONFLICT AMONG THE CIRCUIT COURTS AND NO NATIONALLY IMPORTANT LABOR LAW ISSUE.

In Section III.B of its Petition, the Union contends that the D.C. Circuit incorrectly applied the D.C. Circuit's own decision in *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227 (D.C. Cir. 1996), and incorrectly applied the Sixth Circuit's decision in *NLRB v. H&H Pretzel*, 831 F.2d 650 (6th Cir. 1987). The Union does not contend, however, that the D.C. Circuit's decision in the current case conflicts with either *Serramonte* or *H&H Pretzel*. Rather, the Union merely disagrees with the D.C. Circuit's reasons for citing to *Serramonte* and *H&H Pretzel* in the current case.

The panel of the D.C. Circuit in the current case, however, expressly noted that it did not need to rely on the *Serramonte* "substantial change" principle, stating:

> Even if in the pre-impasse context the Union does not have to offer 'a substantial change' in its position,. . . . the Union at no time indicated that it was ready to move on any issue that the parties had discussed. Rather, the parties remained far apart on the issues of exceptional importance – wages, healthcare, holidays, and work week. Under the circumstances, the record evidence points to no conduct indicating the

> Union's belief that further negotiations would be fruitful.

See Petit. App. at 58 (citations omitted). Accordingly, whether or not a "substantial change" occurred was not a necessary inquiry for the D.C. Circuit's holding. The D.C. Circuit has therefore not definitively decided that the *Serramonte* "substantial change" standard applies in a pre-impasse context. The Supreme Court should therefore wait for the Board, the D.C. Circuit and other Courts of Appeals to develop the law on extending *Serramonte* to the pre-impasse context so that the Supreme Court can determine whether significant disagreements or errors of law exist in the extension of *Serramonte* that merit the Supreme Court undertaking a review of the legal issue.[9]

The D.C. Circuit's application of the Sixth Circuit's decision in *H&H Pretzel* also does not create any conflict with the Sixth Circuit or any other Circuit Court of Appeals. Indeed, the Sixth Circuit, as of the time of writing this Response brief, has not issued any decision addressing the propriety of the D.C. Circuit's application of *H&H Pretzel*, and no other Court of Appeals has had occasion to do so. The Sixth Circuit and other Courts of Appeals should be permitted to address the application of *H&H Pretzel* in contexts analogous to the current case (if such analogous contexts ever arise) so that the Supreme Court has a basis for determining whether a

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[9] Although *Serramonte* analyzed the conduct required to break an already existing impasse, the analysis should be no different in assessing whether impasse is initially achieved. The question of law in either case is whether impasse existed or whether statements or conduct held out hope of a possible agreement under *Taft Broadcasting*, 163 N.L.R.B. at 478.

substantial and vitally important national issue of labor law exists that merits this Court's intervention. Accordingly, the Union's Petition relative to its second Question Presented for review should be denied.

CONCLUSION

For all of the reasons stated herein, the Union's Petition should be denied as to each of the three questions presented in the Petition.

Respectfully submitted,

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App. 1

No. 00-1769

In the Supreme Court of the United States

GRINNELL FIRE PROTECTION SYSTEMS COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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* * *

assured petitioner that the Union was unwilling to "give up" on reaching a contract, but also offered a concessionary proposal of geographically targeted wage reductions. *Id.* at 68a. Furthermore, on that same day, when petitioner rejected the Union's proposal. Preuett again offered to make additional wage concessions if petitioner would isolate the geographic areas in which such reductions were needed. *Ibid.* After petitioner indicated its unwillingness to continue bargaining, Preuett reiterated petitioner's offer from earlier that day to bring in a federal mediator to help the parties resolve their outstanding issues. *Id.* at 68a-69a. In that light, the Board reasonably relied on Preuett's statements of flexibility, because they were consistent with the Union's actual bargaining conduct.[5]

Finally, petitioner assails (Pet. 22-24) the Board for disregarding the two bargaining sessions that occurred before Preuett became the Union's chief negotiator. The Board, however, reasonably found that the bargaining sessions involving Preuett were the most relevant to determining whether an impasse existed. In effect, bargaining "began anew" with Preuett's arrival on the scene. *NLRB v. WPIX, Inc.*, 906 F.2d 898, 901 (2d Cir.), cert.

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[5] In support of its argument, petitioner relies on evidence not found by the Board or the ALJ. See Pet. 21 (citing Preuett's alleged statements to the NFSA about the Union's negotiations with petitioner). Because they were not credited by the ALJ, the Board, or the court of appeals, those factual assertions, which the Board disputes, provide no basis for relief in this Court.

denied, 498 U.S. 921 (1990). After taking charge of negotiations, Preuett advised petitioner that a strike was not in fact planned for April 1, as the Union had previously announced. Pet. App. 7a, 9a, 99a, 101a. Moreover, under Preuett the Union moved quickly from a bargaining position seeking increases in wages and benefits to a willingness to accept freezes or reductions in both. See *id.* at 7a, 9a-15a, 101a-108a. Thus, as the court of appeals concluded, the Board reasonably found that the Preuett bargaining sessions were the most probative on the question of impasse. *Id.* at 22a n.10, 115a-116a.[6]

In short, as the court of appeals concluded, there is "no reason to disturb the Board's careful analysis of the[ ] complicated labor negotiations" at issue in this case. Pet. App. 34a.

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[6] The District of Columbia Circuit's recent finding of an actual impasse in *TruServ Corp. v. NLRB*, 254 F.3d 1105 (2001), does not conflict with the court of appeals' decision in this case. In *TruServ*, unlike here, the parties had a longstanding preexisting bargaining relationship, and had met for negotiations twice as many times as had petitioner and the Union prior to petitioner's unilateral implementation of its final contract offer. *Id.* at 1116. Furthermore, the union in *TruServ* gave no indication that it was willing to make concessions in response to the employer's final offer. *Id.* at 1116-1117. In contrast, the Union here demonstrated its flexibility and willingness to make further concessions in response to petitioner's "final proposal" on April 12, 1994. Pet. App. 14a-15a.

CASE NO. 00-1356

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRUSERV CORPORATION, f/k/a Cotter & Company
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

TEAMSTERS LOCAL UNION NO. 293,
Intervenor.

Pursuant to D.C. Cir. R. 28(e), Intervenor Teamsters Local Union No. 293 joins in the brief of Respondent/ Cross-Petitioner, National Labor Relations Board.

Intervenor Teamsters Local Union No. 293 respectfully reserves its right to fully participate in oral arguments.

Respectfully submitted,

/s/ John M. Masters
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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1356 **September Term, 2000**

TruServ Corporation,
f/k/a Cotter & Company,
Petitioner

v.

National Labor Relations
Board,
Respondent

Teamsters Local Union
No. 293,
Intervenor

BEFORE: Ginsburg, Chief Judge; Edwards, Williams, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

Filed On:
(Aug. 17, 2001)

ORDER

Upon consideration of intervenor's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/Linda Jones
Linda Jones
Deputy Clerk